

CRS Report for Congress

Congressional Influences on Rulemaking Through Appropriations Provisions

Updated February 11, 2008

Curtis W. Copeland
Specialist in American National Government
Government and Finance Division



Prepared for Members and
Committees of Congress

Report Documentation Page			<i>Form Approved OMB No. 0704-0188</i>	
<p>Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p>				
1. REPORT DATE 11 FEB 2008	2. REPORT TYPE	3. DATES COVERED 00-00-2008 to 00-00-2008		
4. TITLE AND SUBTITLE Congressional Influences on Rulemaking Through Appropriations Provisions			5a. CONTRACT NUMBER	
			5b. GRANT NUMBER	
			5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)			5d. PROJECT NUMBER	
			5e. TASK NUMBER	
			5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Congressional Research Service, The Library of Congress,101 Independence Ave SE,Washington,DC,20540-7500			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSOR/MONITOR'S ACRONYM(S)	
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited				
13. SUPPLEMENTARY NOTES				
14. ABSTRACT				
15. SUBJECT TERMS				
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 13
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified	19a. NAME OF RESPONSIBLE PERSON	

Congressional Influences on Rulemaking Through Appropriations Provisions

Summary

The statutory provision known as the “Congressional Review Act” (CRA) (5 U.S.C. §§801-808) established expedited procedures by which Congress may disapprove agencies’ rules by enacting a joint resolution of disapproval, with subsequent presentation to the President for signature or veto. Although initially viewed as a reassertion of congressional authority over rulemaking and regulatory agencies, the CRA is now viewed by some as much less effective — having been used to overturn only one rule in the more than 11 years since it took effect. However, Congress has various other methods to influence agency rulemaking activity, including the addition of provisions to appropriations bills.

This report examines the Consolidated Appropriations Act for 2008 (P.L. 110-161) and identifies four types of provisions that prevent or restrain federal rulemaking or regulatory activities: (1) restrictions on the issuance of particular final regulations, (2) restrictions on the development of general categories of regulations, (3) implementation or enforcement restrictions, and (4) conditional restrictions. Examples of each of these categories are provided in this report. Although none of these appropriations provisions appears designed to *reverse* agency rulemaking actions (as the CRA was intended to permit), the number and variety of the provisions clearly illustrate that Congress’s ability to oversee and affect regulatory agencies is not confined to CRA resolutions of disapproval.

Provisions prohibiting the development or finalization of regulations appear more effective than limitations on the enforcement of regulations, which do not relieve regulated entities of their compliance responsibilities. Also, some regulations are implemented through state or local governments, and some state or local governments have their own statutory and regulatory requirements that are the same as or similar to the federal rules at issue. Finally, it is unclear whether the President will view any of these regulatory restrictions on agency action as unconstitutional infringements on his authority to manage the executive branch.

This report will be updated if any changes occur that alter the factual information in the report.

Contents

Restrictions on the Issuance of Particular Final Rules	3
Restrictions on Regulatory Activity Within Certain Areas	5
Implementation or Enforcement Restrictions	7
Conditional Restrictions	8
Concluding Observations	9

Congressional Influences on Rulemaking Through Appropriations Provisions

In March 1996, the statutory provisions commonly known as the “Congressional Review Act” (CRA) (5 U.S.C. §§801-808) were included as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA). Under the CRA, before any final rule can take effect, it must be filed with each house of Congress and the Government Accountability Office (GAO). The act established expedited procedures by which Congress may disapprove agencies’ rules by enacting a joint resolution of disapproval, with subsequent presentation to the President for signature or veto.¹

Although initially considered a reassertion of congressional authority over rulemaking agencies, the CRA is now viewed by some observers as far less effective than originally anticipated.² Between April 1996 and October 2007, federal agencies submitted more than 46,000 rules to GAO (and, presumably, to Congress), and 43 CRA joint resolutions of disapproval were introduced regarding 32 rules. However, during this 11-year period, only one rule was overturned through the CRA’s procedures—OSHA’s ergonomics standard in March 2001—and that reversal was the result of a unique set of circumstances.³

Even though the CRA has not proven to be an effective way for Congress to reverse agency rulemaking, Congress does influence regulatory activity in a variety of other ways. Those methods include how specifically the underlying statutes are written,⁴ statutory requirements delineating the analytical and procedural steps that

¹ For a detailed discussion of CRA procedures, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth.

² Testimony of Morton Rosenberg, Specialist in American Public Law, Congressional Research Service, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Oversight of the Congressional Review Act*, hearings, 110th Cong., 1st sess., November 6, 2007. On page 2 of his written testimony, Rosenberg said, “we know enough to conclude that [the CRA] has not worked well to achieve the objectives of its sponsors: to set in place an effective mechanism to keep Congress informed about the rulemaking activities of federal agencies and to allow for expeditious congressional review, and possible nullification, of particular rules.”

³ In this case, the incoming President (George W. Bush) did not veto the resolution disapproving the outgoing President’s (William J. Clinton’s) rule. See CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg, for a description of several possible factors affecting the law’s use.

⁴ All regulations start with an act of Congress, and are the means by which statutes are
(continued...)

must be followed in the development of proposed and final rules,⁵ oversight hearings on particular rules or rulemaking requirements, confirmation hearings for the heads of regulatory agencies, and provisions included in the text of agencies' appropriations bills.⁶

Compared to the other congressional methods, the effects of appropriations provisions on rulemaking have received comparatively little attention by analysts, but those provisions can have substantial effects on agencies' regulatory activities. Some of the appropriations provisions direct agencies to develop rules in particular areas, or to take particular enforcement actions. For example, within the Consolidated Appropriations Act for 2008 (P.L. 110-161, signed by President George W. Bush on December 26, 2007), Section 563 within Division E of the legislation (the Department of Homeland Security Appropriations Act, 2008) amends the Homeland Security Act of 2002 (6 U.S.C. §361 *et seq.*) and requires the Secretary of the Department of Homeland Security to "regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility in accordance with the subtitle to prevent the misappropriation or use of ammonium nitrate in an act of terrorism." The legislation delineates what the regulations must contain (e.g., a registration process for owners, records that must be maintained, and an appeals process); and mandates that the Secretary "(1) shall issue a proposed rule implementing this subtitle not later than 6 months after the date of the enactment of this subtitle; and (2) shall issue a final rule implementing this subtitle not later than 1 year after such date of enactment."

Other appropriations provisions affect the process by which rules are developed. For example, a provision within Title II within Section D of the Consolidated Appropriations Act for 2008 states that "none of the funds appropriated in this Act for the Office of Management and Budget [OMB] may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §601 *et*

⁴ (...continued)

implemented and specific requirements are established. The specificity of the statutory basis for a regulation can vary significantly, from broad grants of rulemaking authority that state the general intent of the legislation to very specific requirements delineating exactly what regulatory agencies should do and how they should do it. For examples of both general and specific statutory authorities, see U.S. General Accounting Office, *Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit*, GAO/GGD-99-20, January 8, 1999.

⁵ These statutory rulemaking requirements include the Administrative Procedure Act (5 U.S.C. §551 *et seq.*), the Paperwork Reduction Act (44 U.S.C. §§3501-3520), the Regulatory Flexibility Act (5 U.S.C. §§601-612), Title II of the Unfunded Mandates Reform Act (2 U.S.C. §§1532-1538), and the Information Quality Act (44 U.S.C. §§3504(d)(1) and 3516). For a discussion of these and other requirements, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Curtis W. Copeland.

⁶ Limitations on the expenditure of funds may be in the text of legislation, or in committee reports, conference reports, or managers' statements. Only provisions in the text of the legislation are legally binding. See CRS Report 98-518 GOV, *Earmarks and Limitations in Appropriations Bills*, by Sandy Streeter. In this report, all of the provisions mentioned were in the text of the legislation.

*seq.).*⁷ Language prohibiting OMB review of agricultural marketing orders and other materials has been in legislation funding OMB for about 25 years.

Still other provisions in appropriations acts are intended to *prevent* regulatory agencies from taking certain actions. For example, for six years (FY1996 through FY2001), the Department of Transportation's appropriations acts stated that none of the funds in the act could be used to prepare, propose, or promulgate regulations prescribing corporate average fuel economy, or "CAFE," standards for automobiles that differed from the standards promulgated prior to the enactment of the legislation. Therefore, the department concluded that it was required to keep the same CAFE standard that applied in each of the previous years.⁸ Such repetitive restrictions in appropriations acts appear to be an effective way to block certain rules. Conversely, discontinuance of those restrictions would remove the bar and permit agencies to go forward with those rules.

The remainder of this report focuses on the Consolidated Appropriations Act for 2008 and identifies four types of provisions in the legislation that appear to prevent or restrict federal rulemaking or regulatory activities: (1) prohibitions on the issuance of particular final regulations, (2) prohibitions on the development of regulations with regard to particular statutes or issues, (3) implementation or enforcement restrictions, and (4) conditional restrictions. Examples of each of these categories are provided below, followed by a brief concluding discussion. Although none of these appropriations provisions would *nullify* agency rulemaking actions (e.g., eliminating a rule from the *Code of Federal Regulations*, as the CRA was intended to permit), the number and variety of the provisions clearly illustrate that Congress's ability to oversee and affect rulemaking and regulatory agencies is not confined to CRA resolutions of disapproval.

Restrictions on the Issuance of Particular Final Rules

Certain provisions in the Consolidated Appropriations Act for 2008 prevent the finalization of particular proposed rules by denying the use of funds. For example:

- Section 723 within Division A of the legislation (the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2008) states that "None of the funds made available by this Act may be used to issue a final rule in furtherance of, or otherwise implement, the proposed rule on cost-sharing for animal and plant health emergency programs of the

⁷ Under Executive Order 12866, OMB reviews draft regulations before they are published as proposed or final rules. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

⁸ See U.S. General Accounting Office, *Department of Transportation, National Highway Traffic Safety Administration: Light Truck Average Fuel Economy Standard, Model Year 2000*, GAO/OGC-98-42, April 17, 1998; and U.S. Government Accountability Office, *Vehicle Fuel Economy: Reforming Fuel Economy Standards Could Help Reduce Oil Consumption by Cars and Light Trucks, and Other Options Could Complement These Standards*, GAO-07-921, August 2, 2007.

Animal and Plant Health Inspection Service published on July 8, 2003 (Docket No. 02-062-1; 68 Fed. Reg. 40541).⁹ Other than the extension of the proposed rule's comment period until November 2003,¹⁰ the agency had taken no further action on the July 2003 proposed rule, and had not indicated in recent editions of the *Unified Agenda of Federal Regulatory and Deregulatory Actions* that it intended to take action on the rule in the future.¹⁰

- Section 735 within Division D of the legislation (the Financial Services and General Government Appropriations Act, 2008) states that “none of the funds appropriated or made available under this Act or any other appropriations Act may be used ... to implement the proposed regulations of the Office of Personnel Management [OPM] to add sections 300.311 through 300.316 to part 300 of title 5 of the Code of Federal Regulations, published in the Federal Register, volume 68, number 174, on September 9, 2003 (relating to the detail of executive branch employees to the legislative branch).” Among other things, the proposed regulation would prohibit any executive agency from detailing or otherwise assigning an employee to the legislative branch without the approval of the OPM Director. The agency had taken no further action on the September 2003 proposed rule, and had not indicated in recent editions of the *Unified Agenda* that it intended to take action on the rule in the future.
- Section 559 of Division E of the legislation states that “None of the funds made available in this Act may be used by the Secretary of Homeland Security or any delegate of the Secretary to issue any rule or regulation which implements the Notice of Proposed Rulemaking related to Petitions for Aliens To Perform Temporary Nonagricultural Services or Labor (H-2B) set out beginning on 70 Fed. Reg. 3984 (January 27, 2005).” Other than the extension of the comment period until April 2005,¹¹ the agency had taken no further action on the January 2005 proposed rule, and had not indicated in the *Unified Agenda* that it intended to take action in the future.
- Section 432 of Division F of the legislation (the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2008) states that “None of the funds made available under this Act may be used to promulgate or implement the Environmental

⁹ U.S. Department of Agriculture, Animal and Plant Health Inspection Service, “Cost-Sharing for Animal and Plant Health Emergency Programs,” 68 *Federal Register* 51713, August 28, 2003.

¹⁰ The *Unified Agenda* is published twice each year in the *Federal Register*, and provides uniform reporting of data on regulatory activities under development throughout the federal government.

¹¹ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Petitions for Aliens to Perform Temporary Nonagricultural Services or Labor (H-2B),” 70 *Federal Register* 11585, March 9, 2005.

Protection Agency [EPA] proposed regulations published in the Federal Register on January 3, 2007 (72 Fed. Reg. 69).” The proposed rule at issue would have amended the general provisions to the national emission standards for hazardous air pollutants, replacing a policy that had been established in 1995. The agency had taken no further action on the proposed rule, and had not indicated in the *Unified Agenda* that it intended to take action in the future.

- Section 170 within Division K of the legislation (the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008) states that “None of the funds provided or limited under this Act may be used to issue a final regulation under section 5309 of title 49, United States Code, except that the Federal Transit Administration may continue to review comments received on the proposed rule (Docket No. FTA-2006-25737).” Section 5309 of Title 49 involves “capital investment grants.” The proposed rule was issued on August 3, 2007, and proposed changes in the Federal Transit Administration’s “Small Starts” capital investment grant program.¹² The December 2007 *Unified Agenda* listed the rule as part of the Department of Transportation’s Regulatory Plan (signifying it as one of the department’s most important regulatory actions), but did not indicate when any final rule was expected to be issued.¹³

Restrictions on Regulatory Activity Within Certain Areas

Other provisions in the Consolidated Appropriations Act for 2008 are more general, prohibiting the development, issuance, amendment, implementation, or enforcement of regulations regarding a particular statute or within a particular area. For example:

- Section 726 within Division A of the legislation states that “None of the funds provided in this Act may be used for salaries and expenses to draft or implement any regulation or rule insofar as it would require recertification of rural status for each electric and telecommunications borrower for the Rural Electrification and Telecommunication Loans program.”¹⁴

¹² U.S. Department of Transportation, Federal Transit Administration, “Major Capital Investment Projects,” 72 *Federal Register* 43327, August 3, 2007.

¹³ U.S. Department of Transportation, Federal Transit Administration, “Major Capital Investment Projects—New/Small Starts,” 72 *Federal Register* 69906, December 10, 2007.

¹⁴ This provision was also in the “Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006” (P.L. 109-97, November 10, 2005, Sec. 762).

- Section 511 within Division D of the legislation states that “None of the funds appropriated by this Act may be used by the Federal Communications Commission to modify, amend, or change its rules or regulations for universal service support payments to implement the February 27, 2004 recommendations of the Federal-State Joint Board on Universal Service regarding single connection or primary line restrictions on universal service support payments.”
- Section 617 within Division D of the legislation states that “for fiscal years 2008 and 2009, neither the Board of Governors of the Federal Reserve System nor the Secretary of the Treasury may determine, by rule, regulation, order, or otherwise, for the purposes of section 4(K) of the Bank Holding Company Act of 1956, or section 5136A of the Revised Statutes of the United States, that real estate brokerage activity or real estate management activity (which for purposes of this paragraph shall be defined to mean ‘real estate brokerage’ and ‘property management’ respectively, as those terms were understood by the Federal Reserve Board prior to March 11, 2000) is an activity that is financial in nature, is incidental to any financial activity, or is complementary to a financial activity. For purposes of this paragraph, ‘real estate brokerage activity’ shall mean ‘real estate brokerage’, and ‘real estate management activity’ shall mean ‘property management’ as those terms were understood by the Federal Reserve Board prior to March 11, 2000.”
- Section 823 within Division D of the legislation (within the general provisions applicable to the District of Columbia) states that “None of the funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801 et seq.) or any tetrahydrocannabinols derivative.”
- Section 433 of Division F of the legislation states that “None of the funds made available by this Act shall be used to prepare or publish final regulations regarding a commercial leasing program for oil shale resources on public lands pursuant to section 369(d) of the Energy Policy Act of 2005 (Public Law 109-58) or to conduct an oil shale lease sale pursuant to subsection 369(e) of such Act.”
- The section of the legislation providing funds for salaries and expenses at the Occupational Safety and Health Administration (OSHA) within Division G of the legislation (the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2008) contains a provision stating that “none of the funds appropriated under this paragraph shall be obligated or expended to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the Act which is applicable to any person who is engaged in a farming operation which does not

maintain a temporary labor camp and employs 10 or fewer employees.”

- A section of the legislation within Division K of the act having to do with Federal Aviation Administration Operations states that “none of the funds in this Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act.”
- Section 111 within Division K states that “None of the funds in this Act shall be used to pursue or adopt guidelines or regulations requiring airport sponsors to provide to the Federal Aviation Administration without cost building construction, maintenance, utilities and expenses, or space in airport sponsor-owned buildings for services relating to air traffic control, air navigation, or weather reporting: Provided, That the prohibition of funds in this section does not apply to negotiations between the agency and airport sponsors to achieve agreement on ‘below-market’ rates for these items or to grant assurances that require airport sponsors to provide land without cost to the FAA for air traffic control facilities.”

Implementation or Enforcement Restrictions

In still other cases, language in the Consolidated Appropriations Act of 2008 specifically prevents the implementation or enforcement of a rule or set of rules by withholding funds. In some cases a particular rule or set of rules is specified, but in other cases it is not clear whether any particular rules are already in place. For example:

- Section 741 within Division A of the legislation states that “None of the funds made available in this Act may be used to pay the salaries or expenses of personnel to — (1) inspect horses under section 3 of the Federal Meat Inspection Act (21 U.S.C. 603); (2) inspect horses under section 903 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note; Public Law 104-127); or (3) implement or enforce section 352.19 of title 9, Code of Federal Regulations.”
- A condition in Division D of the legislation that is associated with a nearly \$118 million payment to the Postal Service Fund for revenue forgone on free and reduced-rate mail was that “none of the funds made available to the Postal Service by this Act shall be used to implement any rule, regulation, or policy of charging any officer or employee of any State or local child support enforcement agency, or any individual participating in a State or local program of child support enforcement, a fee for information requested or provided concerning an address of a postal customer.”

- Section 621 within Division D of the legislation states that “None of the funds made available by this Act may be used by the Federal Communications Commission to implement the Fairness Doctrine, as repealed in General Fairness Doctrine Obligations of Broadcast Licensees (50 Fed. Reg. 35418 (1985)), or any other regulations having the same substance.”

Other provisions in the Consolidated Appropriations Act for 2008 appear to have the opposite intent — i.e., *forbidding the prohibition* of regulatory enforcement. For example, Section 606 within Division D of the legislation states that “None of the funds made available by this Act shall be available for any activity or for paying the salary of any Government employee where funding an activity or paying a salary to a Government employee would result in a decision, determination, rule, regulation, or policy that would prohibit the enforcement of section 307 of the Tariff Act of 1930 (19 U.S.C. 1307).”

Conditional Restrictions

Another set of provisions in the Consolidated Appropriations Act of 2008 make implementation of a particular rule or set of rules conditional upon certain other actions by agencies or Congress. For example:

- A provision within Division F of the legislation states that “None of the funds made available to the Indian Health Service in this Act shall be used to implement the final rule published in the Federal Register on September 16, 1987, by the Department of Health and Human Services, relating to the eligibility for the health care services of the Indian Health Service until the Indian Health Service has submitted a budget request reflecting the increased costs associated with the proposed final rule, and such request has been included in an appropriations Act and enacted into law.”
- Section 110 within Division G of the act states that “None of the funds made available in this or any other Act shall be available to finalize or implement any proposed regulation under the Workforce Investment Act of 1998, Wagner-Peyser Act of 1933, or the Trade Adjustment Assistance Reform Act of 2002 until such time as legislation reauthorizing the Workforce Investment Act of 1998 and the Trade Adjustment Assistance Reform Act of 2002 is enacted.”¹⁵
- Section 305 within Division G states that “None of the funds made available in this Act may be used to promulgate, implement, or enforce any revision to the regulations in effect under section 496 of the Higher Education Act of 1965 on June 1, 2007, until legislation specifically requiring such revision is enacted.”

¹⁵ This provision also appeared in the Revised Continuing Appropriations Resolution, 2007 (P.L. 110-5, February 15, 2007).

Concluding Observations

These examples illustrate that, through a variety of provisions added to appropriations acts, Congress can have a substantive effect on agency rulemaking activity beyond joint resolutions of disapproval pursuant to the Congressional Review Act. Some of the provisions in the Consolidated Appropriations Act for 2008 had been in previous appropriations measures, but some appeared to be new to this legislation.¹⁶ Similarly, previous appropriations measures contained restrictions on the development or implementation of regulations that were not included in the Consolidated Appropriations Act of 2008.¹⁷ Provisions in appropriations acts are binding only for the period of time covered by the legislation (i.e., a fiscal year or a portion of a fiscal year). Therefore, any regulatory restriction that is not repeated in the next relevant appropriations act or enacted in other legislation is no longer binding on the relevant agency or agencies.

Most of the regulatory restrictions are in appropriations bills providing funds for particular agencies or groups of agencies (e.g., agencies funded by the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2008). Therefore, the prohibitions are applicable only to the agencies funded by that appropriations measure. However, some of the regulatory prohibitions are in the “General Provisions — Government-wide” section of one of the appropriations measures (for FY2008, Title VII of the Financial Services and General Government Appropriations Act), and are therefore applicable to virtually all federal agencies. For example, the provision in Section 735 of Division D of the Consolidated Appropriations Act of 2008 that prohibited the use of funds to implement a proposed rule on details to the legislative branch was in the “General Provisions — Government-wide” section of the act. Although this and other restrictions in that section are applicable government-wide, they are often written in such a way that, in practice, only certain agencies are actually affected (in this case, OPM).

As noted earlier in this report, unlike joint resolutions of disapproval under the Congressional Review Act, the provisions in the Consolidated Appropriations Act for 2008 do not nullify final rulemaking actions taken by regulatory agencies. Therefore, any final rule that has taken effect and been codified in the *Code of Federal Regulations* will continue to be binding law — even if language in the

¹⁶ The provisions having to do with the Rural Electrification and Telecommunication Loans program, the Workforce Investment Act of 1998, and the Trade Adjustment Assistance Reform Act, *inter alia*, were in previous appropriations acts.

¹⁷ For example, Section 760 of the “Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006” (P.L. 109-97, November 10, 2005) stated that “None of the funds provided in this Act may be used for salaries and expenses to carry out any regulation or rule insofar as it would make ineligible for enrollment in the conservation reserve program established under subchapter B of chapter 1 of subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3831 et seq.) land that is planted to hardwood trees as of the date of enactment of this Act and was enrolled in the conservation reserve program under a contract that expired prior to calendar year 2002.” No similar provision was in the Consolidated Appropriations Act for 2008.

relevant regulatory agency's appropriations act prohibits the use of funds to enforce the rule. Regulated entities are still required to adhere to applicable requirements (e.g., installation of pollution control devices, submission of relevant paperwork), even if violations are unlikely to be detected and enforcement actions cannot be taken by federal agencies.

Some of the appropriations provisions restricting regulatory actions may not be all encompassing. Some federal agencies may derive funds from sources other than congressional appropriations (e.g., user fees), and the use of those funds to develop, implement, or enforce rules does not appear to be legally constrained by language stating that funds in a particular appropriations measure could not be used to draft a rule or implement its provisions. Also, some federal regulations (particularly those issued by EPA and OSHA) are primarily enforced by state or local governments, and those governments may have sources of funding that are independent of the federal funds that are restricted by the appropriations provisions. Some state or local governments may also have their own statutory and regulatory requirements that are the same as or similar to the federal rules at issue. If state or local funds or legal authorities are used to develop, implement, or enforce regulations, those actions would not appear to be constrained by statutory provisions limiting the use of *federal* funds to restrict action on particular *federal* laws and regulations.

Also unclear is how these restrictions on regulatory agencies in the Consolidated Appropriations Act for 2008 will be viewed and implemented by the President. In his December 26, 2007, signing statement on the legislation, President George W. Bush said the act "contains certain provisions similar to those found in prior appropriations bills passed by the Congress that might be construed to be inconsistent with my Constitutional responsibilities. To avoid such potential infirmities, the executive branch will interpret and construe such provisions in the same manner as I have previously stated in regard to similar provisions."¹⁸ If President Bush views these restrictions on agencies' rulemaking and regulatory authorities as unconstitutional infringements on his ability to manage the executive branch, the agencies might be directed to ignore the restrictions in the appropriations act. On the other hand, because all agency regulations are based on some type of statutory rulemaking authority, Congress may view any failure to adhere to the appropriations restrictions as equally unconstitutional.¹⁹ In this situation, federal courts may have to decide whether the appropriations provisions are binding on the agencies.

¹⁸ To view a copy of this signing statement, see [<http://www.whitehouse.gov/news/releases/2007/12/20071226-1.html>]. For more information on signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T.J. Halstead. For information on how signing statements have been implemented, see U.S. Government Accountability Office, *Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts*, B-308603, June 18, 2007; and U.S. Government Accountability Office, *Presidential Signing Statements — Agency Implementation of Ten Provisions of Law*, B-309928, December 20, 2007.

¹⁹ For more on the perspective of federal rulemaking agencies as extensions of Congress, and regulations as extensions of legislative activity, see David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: The University of Alabama Press, 2000).